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IN THE

Supreme Court of the United States

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDING.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SEPARATE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, on behalf of Respondent Committees acting for Interborough Rapid Transit Company 7% Secured Notes and 5% Bonds and on behalf of Respondent Guaranty Trust Company of New York, as Trustee of the Interborough 5% Mortgage.

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SEPARATE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, ON BEHALF OF:

(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;

(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and

(3) Guaranty Trust Company of New York, as Trustee of Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.

Introductory Statement Identifying the Above Mentioned Committees and Trustee.

The facts are sufficiently set forth in the opinion of the Circuit Court of Appeals per L. Hand, C. J., reported in 61 Fed. (2d) 934, and in briefs filed herein by counsel for the Receivers of Interborough Rapid Transit Company and for The American Brake Shoe and Foundry Company, and will therefore not be repeated in this brief, except that certain facts peculiarly pertinent to the status of the above mentioned Committees and Trust Company are here referred to.

The above mentioned Committees and Trustee, hereinafter sometimes referred to as the "Committees" and the "Trustee", were appellants in the appeals (R. 738, 759, 779) which were taken from three orders of the District Court of the Southern District of New York to the Circuit Court of Appeals for the Second Circuit. These orders were reversed by the Circuit Court of Appeals (R. 1035). The petitioner in this Court seeks to review the decision of the Circuit Court of Appeals of the Second Circuit.

The Committees became parties by intervention (R. 189, 191) to the cause in equity, in which The American Brake Shoe and Foundry Company (hereinafter called "Brake Shoe") is complainant, and the Interborough Rapid Transit Company (hereinafter called "Interborough") is defendant, on September 1, 1932, six days after the appointment of Receivers in that cause and on the date of the maturity of the Ten-Year Secured Convertible 7% Gold Notes of the Interborough outstanding in the principal amount of $31,672,100 and secured by $54,989,000 principal amount of Interborough First and Refunding Mortgage 5% Gold Bonds. Guaranty Trust Company of New York, as Trustee of Interborough First and Refunding Mortgage, was made a party to the Brake Shoe cause by order entered therein on September 28, 1932 (R. 226), which order was entered upon the petition of the Interborough Receivers of like date, praying instructions of the Court with respect to the making of certain pay-

ments of interest and taxes, and praying that Guaranty Trust Company of New York be made a party in view of its interest in the funds and property of the Interborough by reason of its being Trustee under the said Mortgage.

The First and Refunding Mortgage, dated March 20, 1913, of the Interborough, under which the above mentioned First and Refunding Mortgage 5% Gold Bonds (hereinafter called "5% Gold Bonds") are outstanding, authorized the issue of $300,000,000 principal amount of Bonds (R. 388), in order principally to obtain funds for financing the construction of the Subway lines authorized to be constructed under Contract No. 3, dated March 19, 1913, between the Interborough and The City of New York, and the construction of improvements and extensions to the Elevated lines under the so-called Interborough and Manhattan Certificates, which are also contracts with the City (R. 333).

In 1922 the Interborough issued its Ten-Year Secured Convertible 7% Gold Notes, which matured September 1, 1932, of which there are presently outstanding $31,672,100, secured by $54,989,000 principal amount of the 5% Gold Bonds. There were as of the date of the Interborough Receivers' application No. 9 (R. 329), in addition to the above mentioned $54,989,000 of pledged Bonds, $132,228,000 of 5% Gold Bonds outstanding in the hands of the public, there were in the sinking fund under the First and Refunding Mortgage $40,110,000, there were in the special trust fund of Guaranty Trust Company for future sinking fund payments $6,556,000, and there were in the Treasury of the Company, $1,169,308 of reacquired Bonds, making a total of $235,082,308 (R. 340). Due to sinking fund operations there have been changes in the above amounts which do not, however, greatly alter the picture.

Early in July of 1932, there was formally created under a Deposit Agreement the present Committee for the Ten-Year Secured Convertible 7% Gold Notes (R. 240), and the holders were advised of negotiations regarding unification and of the approaching maturity of the Notes on September 1, 1932,

and were requested to deposit their Notes. In the latter part of August, and after the appointment of Receivers of the Interborough properties on August 26, 1932, the present Committee for the First and Refunding Mortgage 5% Gold Bonds was formed under a separate Deposit Agreement, although the personnel of the Committee was and is the same as that of the 7% Note Committee, and deposits were requested in view of the appointment of such Receivers (R. 237). These two Committees are the Committees on whose behalf this brief is submitted.

The Committees for the 7% Notes and 5% Gold Bonds now each represent many millions of dollars of deposited Notes and Bonds, respectively, and undertake to speak in the interests of the holders of all of the Notes and Bonds outstanding in the hands of the public (R. 240, 237).

ARGUMENT.

I.

Certiorari will be exercised with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

The well known restraint of the Supreme Court granting writs of certiorari is a clearly defined policy of that Court and one that has been often enunciated. In the case of *American Construction Co.* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U. S. 372 (1892), the basis for the granting or refusing of such writs was fully stated. In this case, in denying a writ of certiorari, the court said (p. 382):

> "The Act [of March 3, 1891] has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in

large classes of cases to the Circuit Court of Appeals, and making the judgments of that court final, except in extraordinary cases."

And the court in the same case further said (p. 383):

"In the same spirit, the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court,' has been held to be a branch of its jurisdiction which should be *exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.*" (Italics ours.)

II.

The present case does not meet the requirements set by the Supreme Court for writs of certiorari.

The case is not one of "peculiar gravity" nor can it be said to be one of "general importance", however important it may seem to the unsuccessful litigants herein. If the feelings of the individual litigant were made the test, nearly every decision of the Circuit Court of Appeals would have to be reviewed by the Supreme Court, for every litigant naturally thinks that his particular situation is one of peculiar gravity. Viewed objectively, however, the present claim by the petitioner is not one of such peculiar gravity as to call for review by the Supreme Court.

The fundamental principles in this field have been laid down by the Supreme Court and in other cases in the Federal Courts cited in the decision of the Circuit Court of Appeals. The Circuit Court of Appeals has acted in accordance with these principles and applied them to the questions presented

in this case. A review of this case would not clarify the general propositions of law involved, but would be a review of the judgment of the Circuit Court of Appeals as to the manner of the application of the principles involved in their interpretation and construction of Federal Court rules and Federal statutes.

There is already "uniformity of decision" and the Circuit Court of Appeals has followed such decisions, so that a review of this case by the Supreme Court is not necessary to establish further the well established principles involved.

III.

The damage and injury that would result to the bondholders and noteholders represented by the committees and the trustee, all other creditors and the public, require that the petition be denied unless on the merits it is clear that it should be granted.

Not only is there no question at issue in this proceeding as to the necessity of intervention of an equity court for the protection of creditors, but all the parties admitted the existence of such necessity. Likewise it is submitted that the necessary jurisdictional facts were and are present in the Brake Shoe cause and that the Federal Equity District Court for the Southern District of New York in the Second Judicial Circuit had from the time of its institution and now has complete and full jurisdiction over the subject matter and the parties to the Brake Shoe cause. The plaintiff in this cause sued in its own behalf and on behalf of all other creditors of the Interborough who might thereafter join in the prosecution of the suit. As above stated the Committees intervened in such cause (R. 189, 191) and the Trustee was made a party by order of the Court (R. 226), and the status of these parties is therefore that of creditors who sought the protection

of the equity court and who joined in the prayer of the complaint in such cause and asked that their rights and the rights of all creditors be ascertained and decreed. The events which took place in the two months following the appointment of the Interborough Receivers were set out in a full statement of the facts involved, in the opinion of the Circuit Court of Appeals above referred to (R. 1024), and it is submitted that this statement of facts shows that the proceedings customarily taken in suits of this character did take place for the protection of creditors from the date of the receivership, August 26, 1932, to the date of the District Court's orders, October 18, 1932 (R. 722, 725), and that such proceedings and the respective orders entered therein were of such a character as to provide substantial protection for the rights of all creditors. The administration of the Interborough properties was greatly interfered with and retarded from October 18, 1932, until December 14, 1932, when the Circuit Court of Appeals reversed the District Court's orders (R. 1035), but even during that period and particularly since then, it has progressed far and rights of innocent parties have become involved. Many of the principal events which have transpired since the above period, are set out in the appendix to the brief herein of the Interborough Receivers.

The Committees and the Trustee in intervening in the Brake Shoe cause took the only course available to protect the vast interests that they represent.

It is the cardinal duty of courts of equity to prevent persons who have acted in good faith, upon the exercise of power by the equity court while it was in possession of apparent jurisdiction, from suffering injury. *Electrical Supply Co.* v. *Put-in-Bay Waterworks, Light & Railway Company*, 84 Fed. 740 (C. C. N. D. Ohio, 1898). The grounds upon which this doctrine rests are, first, the necessity which the Court is under to defend its possession and hold the property subject to its order; and, second, the obligation it thereby assumes to itself to undertake the affording of redress to those whom it prevents by withholding the property, from

obtaining relief elsewhere. This Court has firmly indicated that where the equity courts have been administering the property of creditors under color of authority, so that the rights of innocent parties have become involved, this Court will affirm their acts or arrange for their confirmation so far as necessary to protect the rights of such parties as have relied upon a continuation of their authority. *Harkin* v. *Brundage*, 276 U. S. 36, 57 (1928).

As a result of the decision of the District Court purporting to vacate the orders in the *Brake Shoe* cause, such uncertainty resulted that the normal administration of the Interborough estate was delayed for about two months. While it is not possible to measure the damage and injury thereby caused to the Committees and other creditors, it nevertheless was real and substantial. These Committees urged upon the Circuit Court of Appeals that they were entitled to the active and affirmative exercise of the equity powers of that Court not only to dispel the uncertainties above referred to that then existed, but to afford these properties and those interested in them, including the public, that orderly administration to which they were entitled, free from all collateral disputes and controversies and interference by litigants in other suits. The Circuit Court of Appeals sustained this position by reversing the orders of the District Court, and it is submitted that if the application for writ of certiorari is granted by this Court, there will again arise the same uncertainty as previously existed which will inevitably result in substantial prejudice and injury and expense to these Committees and Guaranty Trust Company of New York as well as other creditors.

It will be noted that in spite of the tremendous public interests, as well as the large interests of these creditors and of all other creditors of the Interborough and Manhattan companies, the petitioner for the writ of certiorari has delayed making such petition from December 14, 1932 (R. 1035), the date of the entry of the orders of the Circuit Court of Appeals, until February 18, 1933.

It is respectfully submitted that this Court should not grant the application for the writ where it is so obvious that so much damage will result, unless it is perfectly clear that on the merits such application should be granted.

The points urged in I, II, and III above are all that properly need be considered in disposing of this petition for certiorari. Any examination of the merits leads to the same result and on such an examination the points successfully urged by the Committees and the Trustee and the other appellants in the Circuit Court of Appeals would again be presented. The arguments in support of these points are not here detailed, and reference is accordingly merely made to the reasoning of the Circuit Court of Appeals.

IV.

The reasoning of the Circuit Court of Appeals and its decision are sound and should be sustained on the merits.

Upon the merits the precise question involved in the appeals to the Circuit Court of Appeals was whether or not agreements or, as asserted, "rules" requiring litigants to make applications for a receiver to the Judge sitting in the motion part of a Federal District Court (not ratified or concurred in by a majority of the Circuit Judges or by the Senior Circuit Judge) should be regarded as mere rules of convenience, having the force of directing the method in which the business in the District Court should be conducted, or whether they should be regarded as having greater force and as being in fact jurisdictional in nature. It is submitted that the decision of the Circuit Court of Appeals is sound and conclusive in holding that the rules in question are not jurisdictional and that accordingly no collateral attack may be made upon action by a judge alleged to be in contravention of such rules.

The so-called Division of Business Order of August 25, 1932, may be disregarded as the Circuit Court of Appeals disregarded it. There remains, therefore, the question of whether the Circuit Judge had authority to act in the manner in which he did and whether there was any infirmity in his authority other than his disregard of rules 1a and 11a of the District Court for the Southern District of New York.

The Senior Circuit Judge of the Second Circuit had the power under Sections 18 and 19 of the Judicial Code to designate himself as a judge to hold a District Court for the Southern District of New York if the public interest so required, and his judgment as to the public interest is final. Such Judge so designated himself, following a practice of long standing not only in the Second Circuit, but in practically every Circuit in the United States, in a general order and in a specific order. These creditors were entitled to act on their knowledge that in consequence of the above designation the Senior Circuit Judge was holding a District Court for the Southern District of New York *de jure* and not even *de facto,* and that by the express terms of Section 18 of the Judicial Code he had "all the powers and rights, * * * of a judge of the district." These Committees had the right under Section 13 of the Judicial Code and Federal Equity Rules 1 and 6, made pursuant to Section 730 of the United States Code, to have any judge holding a District Court in the above District, exercise at all times the authority of the District Court, including the appointment of Receivers of the properties of the Interborough, and to have any District Judge, whether appointed or designated, at chambers or at any other place or time, make for their benefit all orders necessary to carry out the powers which under the law these Committees as creditors were entitled to have exercised for their benefit. These creditors had the right to assume that no agreements or "rules" of such District Court of the character of those under consideration (assuming such agreements or "rules" to have been validly adopted—which is denied) would be employed to oust or to attempt to oust the jurisdiction of a District Judge or a Circuit Judge holding a District Court.

Where the strict enforcement of any such rules which are directory in character would result in throwing into great uncertainty the substantial property interests here involved—as already resulted and is bound to recur in the event of the granting of this application for a writ—this Court, it is respectfully urged, should not review the decision of the Circuit Court of Appeals holding that such rules are merely directory and not jurisdictional in their nature, and that therefore they could not be collaterally attacked.

V.

The petition for writ of certiorari should be dismissed with costs.

Dated, New York, N. Y., March 10, 1933.

Respectfully submitted,

EDWIN S. S. SUNDERLAND,

Counsel for

(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;

(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and

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